Supreme Court, U.S.
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No. 01-1396

IN THE

Supreme Court of the United States

STEPHEN S. PACKARD,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the district court and Tenth Circuit correctly apply the applicable statute of limitations of the Family Medical Leave Act to dismiss the claim of Petitioner Stephen Packard?

CORPORATE DISCLOSURE STATEMENT

Respondent Continental Airlines, Inc. has no parent corporation, and no publicly held company, other than AXA Financial Inc., owns 10% or more of its stock.

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STATEMENT OF THE CASE

This case involves the routine application of the statute of limitations to a claim filed under the Family Medical Leave Act, which includes a standard two-year statute of limitations that can be extended to three years for willful violations of this Act. *See* 29 U.S.C.A. § 2617(c)(1-2). The lower courts correctly determined that the instant FMLA claim fails under either standard.

Petitioner Stephen Packard ("Packard") commenced his claim under the Family Medical Leave Act ("FMLA" or "Act") against Respondent Continental Airlines, Inc. ("Continental") on September 17, 1997. Packard sought to reverse the effect of his decision, more than three years earlier, to enter an early retirement program offered by Continental. In an effort to avail himself of relief through the Family Medical Leave Act, Packard alleged that Continental had willfully denied him FMLA leave, even though Packard had never requested FMLA at any time during the three years preceding the commencement of this action.

The United States District Court for Utah, the Honorable Ted Stewart presiding, entered summary judgment in favor of Continental on all claims on January 11, 2001. [*See* Pet'r App. pp. 7-9]. The district court applied the FMLA's two-year statute of limitations and dismissed Packard's FMLA claim because it had not been timely filed. The district court also rejected Packard's contention that the three-year statute of limitations for willful violations should have applied to his claim because Packard had not introduced any facts to suggest that Continental had recklessly disregarded his rights under the Act. Packard then filed a timely appeal seeking to revive his FMLA claim.

The Tenth Circuit Court of Appeals affirmed the District Court's dismissal of Packard's FMLA claim based on its application of the Act's statute of limitations. [*See* Pet'r App. pp. 1-6]. In its unpublished decision dated December 19, 2001, the Tenth Circuit agreed that the two-year statute of limitations governed this claim because Packard "has failed to show that defendant willfully disregarded its duties under the statute." [Pet'r App. p. 4]. Furthermore, the Tenth Circuit concluded that "[u]nder either the two-year or the three-year statute of limitations, Mr. Packard's case was filed beyond the controlling date." [Pet'r App. p. 6].

I. Statement of Facts

Packard worked as a flight attendant for Continental. During the early 1990's, Packard lived in Salt Lake City but worked out of Houston, Texas. In early 1994, Continental announced cutbacks and other changes to its flight schedule that made it difficult, if not impossible, for a flight attendant like Packard to live in Salt Lake City and commute to his base in Houston. Packard considered his other options — including moving to Houston or transferring to Continental's reservations center in Salt Lake City, albeit at a loss of seniority — before deciding to take early retirement so that he could continue living in Salt Lake City, near his mother and other relatives.

On August 8, 1994, Packard completed the paperwork to participate in Continental's early retirement program. Packard carefully reviewed the forms, and he understood that he could not change his mind after submitting the election form. Packard signed a statement acknowledging that "this request [to participate in the early retirement program] may not be revoked by me once tendered." Under

the terms of this "Early Out" program, Continental promised to release Packard from service sometime between August 29, 1994 and January 1, 1995.

On August 8, 1994, Packard sent a letter to Continental requesting that he be released from duty as soon as possible. Because this request mentioned that Packard wanted to care for his mother, Continental's Director of Inflight Services, Sam Risoli, advised Packard in a letter dated August 19, 1994 that Packard should contact his Base Director or Employee Relations Manager to determine whether he might be eligible for leave under the Family Medical Leave Act, which had taken effect only months before.

Yet Packard chose not to apply for FMLA leave. It is undisputed that he never requested FMLA leave from Continental. Packard never bothered to speak with his Base Director or the Employee Relations Manager to inquire about FMLA leave. Instead, he tried to rescind his irrevocable election into the "Early Out" program. The undisputed record shows, however, that Packard never requested FMLA leave or told Continental that he wanted to take FMLA leave instead of early retirement. Packard's employment with Continental ended on September 30, 1994.

On September 17, 1997, more than three years after Packard was invited by Continental to apply for FMLA leave, Packard filed this action. Although Packard alleged that Continental had willfully denied him FMLA leave, Packard conceded that he never requested FMLA at any time after being invited by Continental to apply for FMLA leave.

II. Clarification of the Record

Because the facts pertinent to this inquiry are set forth in the unpublished decision of the Tenth Circuit, Continental objects to the Petition's inclusion of "facts" that were neither recognized by the lower courts nor are supported by the record. [*See* Pet'r App. pp. 1-6]. Moreover, the Petition includes a number of statements of purported fact that lack any foundation in the record.

Perhaps the most egregious example of Packard's lack of fidelity to the factual record appears on page 12 of the Petition:

> Continental knew that Mr. Packard wanted to use FMLA leave. Continental knew why he wanted to use it. Continental knew that Mr. Packard wanted to rescind his early out request to be able to use FMLA leave and not lose his job. But Continental refused to allow him to do so.

[Petition p. 12].

Each of these statements is demonstrably false. In view of Packard's admission that he never asked for FMLA leave, it defies all reason — not to mention the entire factual record — to suggest that "Continental knew that Mr. Packard wanted to use FMLA leave." [*See* Petition p. 12]. It follows that Continental could not have known why Packard allegedly wanted to use FMLA leave, given the undisputed fact that Packard never applied for or requested FMLA leave. Moreover, there is simply no evidence in the record that supports the Petition's contention that "Continental knew that Mr. Packard wanted to rescind his early out request to be

able to use FMLA leave and not lose his job." Packard apparently credits Continental with clairvoyant abilities. It is simply incredible to assume that Continental knew why Packard might have wanted FMLA leave that he never requested.

This Court should not be misled by rank speculation masquerading as reasonable inferences. To be sure, Packard is entitled, as a party resisting the entry of summary judgment, to the benefit of favorable inferences that might emerge from facts in the record. Unfortunately, the Petition makes several speculative leaps from which the facts in the record provide no launching point. For example, the Petition states as follows:

> Continental could have allowed Mr. Packard to take the leave it was now offering him and not lose his job. All it had to do was allow Mr. Packard to rescind his early out request and to not accept or approve such early out request. Continental could have done so up until September 29, 1994.

[Petition p. 2].

The speculative nature of these statements is betrayed by Packard's choice of verbs. Unfortunately, Packard's speculation about what Continental "could have done" qualifies as nothing more than wishful thinking. Worse, given the undisputed fact that Packard never requested FMLA leave, it is completely unreasonable to draw an inference connecting Packard's desire to rescind his resignation with a request for FMLA leave that Packard never made.

The lower courts correctly determined that Packard's FMLA claim is fatally flawed by Packard's failure to request any FMLA leave. The record establishes — and both the district court and Tenth Circuit acknowledged — that "Mr. Packard asked to rescind his early-out application, *but he did not apply for FMLA leave.*" [Pet'r App. p. 3 (emphasis added)]. Accordingly, the lower courts correctly ruled that Continental did not violate the Family Medical Leave Act because Packard never sought to exercise his FMLA rights.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURTS CORRECTLY APPLIED THE STATUTE OF LIMITATIONS TO DISMISS PACKARD'S UNTIMELY FMLA CLAIM.

The Petition should be denied because the district court and the Tenth Circuit correctly applied the statute of limitations for the Family Medical Leave Act to the undisputed facts of this case. The lower courts found that Packard could not satisfy either the regular two-year statute of limitations or the three-year statute of limitation for willful violations of the Family Medical Leave Act. Packard does not dispute that his claim fails under the regular limitations period; rather, Packard argues that his FMLA claim can be salvaged either by the three-year standard or by equitably tolling any limitations period.

As explained below, Packard's arguments were properly rejected by the lower courts. There is no evidence that Continental willfully violated the Family Medical Leave Act at any time during the three years before Packard commenced this action. Moreover, the Tenth Circuit wisely declined

Packard's invitation to extend the statute of limitations beyond three years because it is undisputed that Continental encouraged Packard to apply for FMLA leave on August 19, 1994. Given this invitation—and Packard's subsequent failure to request any FMLA leave — there is no equitable basis for extending the statute of limitations beyond the time allowed by the plain language of the Act. The Petition should therefore be denied because the lower courts properly interpreted and applied the FMLA's statute of limitations.

A. There Is No Evidence That Continental Willfully Violated the Act.

The three-year statute of limitations is inapplicable to Packard's claim because there is no evidence that Continental willfully violated Packard's FMLA rights. The Family Medical Leave Act states as follows:

> In the case of such an action brought for willful violation of section 2615 of this title, such action may be brought *within 3 years* of the date of the last event constituting the alleged violation for which such action is brought.

29 U.S.C.A. § 2617(c)(2) (emphasis added).

"The standard for willful violations is whether the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [Act].'" *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1334 (10th Cir. 1998) (citation omitted) (applying standard to an analogous provision of the Fair Labor Standards Act); *see also Gilligan v. City of Emporia*, 986 F.2d 410, 413 (10th Cir. 1993) ("To constitute willful conduct, the employer must either

know or show reckless disregard for whether its conduct was prohibited by the statute") (applying standard to Fair Labor Standards Act claim and affirming summary judgment because plaintiff "did not present any evidence whatsoever to the district court of the [defendant's] willfulness").

"To prove a willful violation, [an FMLA plaintiff] must show more than that [his employer] was merely negligent in failing to inform him of his FMLA rights." *Settle v. S.W. Rogers Co.*, 182 F.3d 909, 1999 WL 486643 (4th Cir. 1999) (affirming dismissal where plaintiff's FMLA claim was barred by the two-year statute of limitations and plaintiff had no evidence of a willful violation). "Willful conduct in this context is generally viewed as an employer that knows its conduct to be wrong or has shown reckless disregard for the matter in light of the statute." *Sampson v. Citibank, F.S.B.*, 53 F. Supp.2d 13, 19 (D.D.C. 1999) (citation omitted), *aff'd*, 221 F.3d 196 (D.C. Cir. 2000), *cert. denied*, 531 U.S. 970 (2000). Thus, in order to extend the statute of limitations from two to three years, Packard must show that Continental knew its conduct was wrong or that it showed reckless disregard for his rights under the FMLA.

The lower courts carefully reviewed the factual record and correctly determined that no evidence exists to suggest that Continental recklessly disregarded Packard's FMLA rights. To the contrary, the record establishes that Continental endeavored to comply with its obligations under the relatively new Family Medical Leave Act. For example, even though the Act had been in effect for only a matter of months, Continental advised Packard, in August 1994, that he might be entitled to FMLA leave. After being urged by Continental to explore this option, Packard never requested FMLA leave. It thus follows that Packard could not have been denied —

let alone *willfully* denied — FMLA leave at any time within the three years before this action was filed in September 1997. As a result, the lower courts correctly found that the three-year statute of limitations is inapplicable to Packard's claim.

B. Packard's FMLA Claim Would Still Fail Even if the Three-Year Statute of Limitations Were Applicable.

Packard's FMLA claim cannot survive, even under the three-year statute of limitations, because Packard never requested — and Continental never denied — FMLA leave at any time during the three years preceding the commencement of this action.

The Tenth Circuit observed that "[e]ven if we were to consider willful his supervisor's failure in May 1994 to tell him about the possibility of FMLA leave, that act occurred over three years before Mr. Packard filed this action." [Pet'r App. pp. 4-5]. In any event, the supervisor's omission was cured in August 1994 when Continental advised Packard to consider applying for FMLA leave. Packard never requested FMLA leave after being advised to consider doing so, and then Packard waited more than three years to file this action.

As a result, Packard's FMLA claim cannot escape the reach of the Act's statute of limitations. At no time within three years of the commencement of this action did Packard request FMLA leave. Nor, for that matter, did Continental deny Packard access to FMLA leave at any time during the three years before this action was filed. It follows that Packard's claim cannot satisfy the three-year statute of limitations.

II. THERE IS NO COMPELLING REASON TO GRANT THE PETITION.

The Petition should also be denied because this case involves only the routine application of the statute of limitations for the Family Medical Leave Act. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Absent such factors, this Court should decline to exercise its discretionary power to accept a case for review.

This case does not present any compelling issue that might be worthy of review by the United States Supreme Court. The case authority relied upon by the lower courts to dismiss Packard's FMLA claim is unchallenged; there is not a circuit split or even a mild conflict of case authority. The decisions of the lower courts are founded upon well-established and settled case law.

Furthermore, as explained below, the record in this case does not present any original question of statutory interpretation. Moreover, the matters of statutory construction proposed by the Petition are not ripe for appellate review, given both Packard's failure to request any FMLA leave and the untimeliness of his FMLA claim.

The Petition should therefore be denied because there are no conflicts of authority calling for resolution and because there are no relevant statutory provisions in need of definitive interpretation.

A. Continental Did Not Interfere With Packard's FMLA Rights.

Packard's contention that Continental supposedly interfered with the exercise of his FMLA rights is fatally flawed by the fact that Packard never requested FMLA leave. Packard's silence served as the primary obstacle to the exercise of his FMLA rights. After all, Continental could not have interfered with rights that Packard never invoked.

There is also no merit to the Petition's suggestion that Continental interfered with Packard's FMLA rights by refusing to rescind his resignation at any time before his last date of employment. This argument is betrayed, of course, by the undisputed fact that Packard never requested FMLA leave. Absent any such request, it defies reason that Continental could have interfered with Packard's FMLA rights. To be sure, a violation of the FMLA may accrue when an employee requests and is denied FMLA leave. But no violation can occur when an employee is denied special permission to reverse a resignation simply because the employee may have a secret and unspoken desire to take FMLA leave.

Courts have shown little tolerance for efforts to confuse FMLA rights with employers' decisions not to reverse resignations or terminations. For example, in *Hammon v. DHL Airways*, the Sixth Circuit affirmed the summary judgment and dismissal of a suit by an airline pilot who wanted to rescind his effective resignation so that he could take FMLA leave. 165 F.3d 441 (6th Cir. 1999). Although the pilot argued that his resignation resulted from duress, the *Hammon* court rejected an argument resembling the position advocated by Packard:

> Notably, when Plaintiff did call [his supervisor] to report his medical condition and attempt to withdraw his statement of resignation, he had already taken both of the steps necessary to complete an 'effective resignation.' Therefore, when Plaintiff attempted to withdraw his resignation request on November 26, 1993, DHL properly informed him that his voluntary resignation had been completed and that DHL had accepted his resignation.

165 F.3d at 449. Other courts have also held that a request for FMLA leave does not reprieve a termination by an employer or reverse a resignation by an employee. *See, e.g., Gearhart v. Sears Roebuck & Co.*, 27 F. Supp.2d 1263, 1275 (D. Kan. 1998), *aff'd*, 194 F.3d 1320 (10th Cir. 1999) (granting summary judgment for an employer where "[s]hortly after apparently resigning from her employment, the plaintiff called her employer and requested medical leave"); *Jeremy v. Northwest Ohio Dev. Ctr.*, 33 F. Supp.2d 635, 637 (N.D. Ohio 1999), *aff'd*, 210 F.3d 372 (6th Cir. 2000) (granting summary judgment for an employer where the employee submitted his resignation and then attempted to rescind the resignation so that he might instead apply for FMLA leave); *Walthall v. Fulton County Sch. Dist.*, 18 F. Supp.2d 1378 (N.D. Ga. 1998), *aff'd*, 192 F.3d 131 (11th Cir. 1999) (granting summary judgment because plaintiff's resignation constituted an 'unequivocal notice of intent not to return to work' and thus relieved the employer of its obligation to restore plaintiff to her former position).

The Petition further alleges that Continental interfered with Packard's FMLA rights "as long as Mr. Packard was

employed by Continental." [Petition p. 14]. The Petition then pushes far beyond the point of absurdity by insisting, for purposes of the statute of limitations, that "[s]uch a situation of interference exists as long as that employer can rescind a resignation." [Petition p. 14]. Packard's proposal would virtually abrogate the FMLA's statute of limitations since most employers retain the discretion to rescind a resignation for an infinite period of time. In essence, Packard asks the judiciary to adopt an interpretation that would swallow the FMLA's statute of limitations whole.

The district court and the Tenth Circuit wisely declined Packard's invitation to reach issues beyond the factual scope of this case. Packard never asked for FMLA leave, and Continental never interfered with a request that was never made. It follows that Continental did not interfere with Packard's FMLA rights.

B. Packard Could Not Have Been Denied Meaningful FMLA Leave Because He Never Requested Any FMLA Leave.

The Petition urges acceptance of this case so that the Court may decide whether Packard was denied meaningful access to leave when Packard was unable to rescind his resignation to instead take FMLA leave. The trouble with this suggestion is that this issue is purely hypothetical. Packard never asked for FMLA leave and Packard never explained to Continental that he wanted to rescind his resignation in order to take FMLA leave. The Tenth Circuit reviewed the factual record and summarized the situation as follows:

> Mr. Packard asked to rescind his early-out application, *but he did not apply for FMLA leave.* Apparently, Mr. Packard concluded that he first had to rescind his early-out decision before applying for FMLA leave.

[Pet'r App. p. 3 (emphasis added)]. The error of Packard's ways — for starters, his faulty assumption that the reversal of his resignation was a prerequisite for taking FMLA leave — cannot be attributed to Continental. The employer should not be liable simply because Packard apparently made the decision not to seek FMLA leave unless he first managed to rescind his entry into the early retirement program. Packard's ability to take meaningful FMLA leave was never contingent on the reversal of his resignation.

The uncontroverted record shows that Continental advised Packard to inquire about his eligibility for FMLA leave and that Packard chose not to do so. As a result, there is simply no evidence that Continental denied Packard access to meaningful FMLA leave.

C. The Lower Courts Correctly Declined to Toll the Statute of Limitations Beyond the Date Continental Offered FMLA Leave to Packard.

The Tenth Circuit wisely rejected Packard's bid to equitably toll his FMLA claim beyond the date when Continental invited him to apply for FMLA leave. Packard argued, as here, that Continental's refusal to revoke his resignation constituted a continuing FMLA violation. [*See* Petition pp. 15-16]. Both equitable tolling and the continuing violation doctrine are premised, however, on the

concept that the statute of limitations should not run during the time a person is unaware, through no fault of his own, that his rights are being violated.

In this case, it is undisputed that Continental affirmatively advised Packard of his FMLA rights in August 1994. Packard never requested and Continental never denied FMLA leave at any time after Packard was notified by Continental of his FMLA rights. Given that Packard was aware of his rights and simply chose not to exercise them or to pursue timely legal action, it follows that Packard's untimely and baseless FMLA claim is beyond salvage.

CONCLUSION

Because this case presents no compelling reasons for further review, and because the lower courts correctly applied the statute of limitations for the Family Medical Leave Act to dismiss Packard's claim, the Petition for Certiorari should be denied.

Respectfully submitted,

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